Francis Building Corporation *and* Diego Matos. Case 29–CA–20480

January 29, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 18, 1998, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an anwering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as amended.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Francis Building Corporation, Middle Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Diego Matos immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraph 2(b) and reletter the following paragraphs.

"(b) Make Diego Matos whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision."

Stephanie LaTour, Esq., for the Acting General Counsel.
Lee J. Mondshein, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on May 27 and June 11, 1998. The charge was filed November 18, 1996,[1] and the complaint was issued December 17, 1997. The complaint alleges that the Respondent, Francis Building Corporation, violated Section 8(a)(1) of the Act by discharging the Charging Party, Diego Matos, on October 18, because he filed grievances against the Respondent seeking to enforce a collective-bargaining agreement covering his terms and conditions of employment. The Respondent, by its answer filed January 14, 1998, denied the alleged unfair labor practice and asserted, as an affirmative defense, that Matos was discharged for legitimate business reasons, because he did not have the skill and experience to perform the duties required by the Respondent.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in general construction work from its principal office and place of business in Middle Island, New York. Francis Brothers Sewer & Drainage, Inc. (Francis Bros.), a corporation, is also engaged in general construction work from the same business location. The parties stipulated that the Respondent annually provides services valued in excess of $50,000 to Francis Bros. and that Francis Brothers annually provides services valued in excess of $50,000 to various government agencies, including municipalities, the county of Nassau and the U.S. Department of the Navy. The parties further stipulated that the Respondent meets the Board's "indirect outflow" standard for the assertion of jurisdiction. Based on the parties' stipulation, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits and I find that Local 1298, Laborers' International Union of North America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

It is undisputed that the Respondent and Francis Bros. operate out of the same office in Middle Island, New York. During the relevant period in 1996, both companies were owned by the four Francis brothers, i.e., Tom, Ernest, Arthur, and Philip. Ernest Francis was also an officer of both the Respondent and Francis Brothers. The evidence in the record indicates that the Francis brothers also operate another company, from the same office, called Island Bay Development Company. Only the Respondent is signatory to a collective-bargaining agreement with the Union. According to Ernest Francis, Francis Bros. is a nonunion contractor engaged in site work and utility work, i.e., drainage, sewers, water installation, concrete sidewalks, and similar work on the exterior of a building, both residential and commercial. The Respondent is a union contractor that supplies qualified union labor to various jobs. Although the record contains little information about Island Bay, it appears from the testimony of Matos and Francis[3] that it is also a nonunion contractor engaged in similar construction work. Francis further testified that Francis Bros. bids on union and nonunion jobs and, if awarded a union job, contracts with the Respondent to supply union personnel.

I find that the Respondent and Francis Brothers, and probably Island Bay as well, constitute a single employer within the meaning of the Act. I note there is evidence of common ownership and management, common supervision, sharing of offices

[1] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[1] All dates are in 1996 unless otherwise indicated.

[2] At the hearing, I rejected G.C. Exhs. 13(e) through (g), because they had not been properly authenticated. The Court Reporting Service included these exhibits in the bound exhibits which had been received in evidence. I will correct the record to place G.C. Exhs. 13(e) through (g) in the rejected exhibit file.

[3] All references in this decision to the testimony of Francis refer to Ernest Francis, who was the only Francis brother to testify in this proceeding.

and equipment and some employee interchange as evidenced by Matos assignment as an employee of Island Bay to work on one of the Respondent's jobs under a contract between the Respondent and Francis Brothers. I also note the undisputed testimony that two other Island Bay employees, Reed and Sweeney, were occasionally sent to perform work on the Fortunoff's job. The evidence also shows centralized control of labor relations in that Francis Brothers bids on union and nonunion jobs and assigns the work to one of the affiliated companies based on whether the work is union or nonunion. See *Radio Technicians Local 1264 v. Broadcast Service of Mobile,* 380 U.S. 255 (1965); *Blumenfeld Theatres Circuit,* 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980). It appears that the Respondent intended to create a double-breasted operation to facilitate bidding on union and nonunion jobs without having all of its employees represented by the Union. See *Operating Engineers Local 627 (Peter Kiewit Sons, Inc.) v. NLRB,* 518 F.2d 1040 (D.C. Cir. 1975), affd. in pertinent part sub nom. *South Prairies Construction Co. v. Operating Engineers Local 627,* 425 U.S. 800 (1976). Whether the Respondent did this correctly under the Act is not before me in this proceeding.

It is undisputed that Matos' relationship with the Francis family began in the mid-1980s when he went to work for a partnership between Tom Francis and Billy Borgiono called Suffolk County Sewer and Drainage. When the partnership split up, according to Matos, Tom Francis asked him to work for him and his new company, i.e., Francis Bros.[4] Matos testified that he worked for Francis Bros. for 6 or 7 years before going to work for Island Bay. He recalled working for Island Bay for 1 or 2 years until 1996 when he was sent to work at the Fortunoff's job in Westbury, New York.[5] According to Matos, his employment with the Francis brothers was continuous except for seasonal layoffs in the winter when it was too cold to work. Matos further testified on direct examination that he did not work for any companies not related to the Francis brothers after 1985. He contradicted himself, however, on cross-examination, when he admitted that he left Francis Bros., in late 1993 or early 1994, when Ernest Francis denied his request for a raise and that he went to work for another unrelated company for about 1 year, returning to Francis Bros. when Tom Francis offered him a job and more money. The limited payroll records in evidence are also not consistent with Matos' claim of continuous employment. Although 1989, 1990, and 1993 W–2 wage and tax statements show significant earnings from Francis Bros. for those years, a paystub from November 1992 shows less than $2600 in earnings to date for that year, suggesting that he worked only part of 1992 for Francis Bros.

According to Matos, when he was employed by Francis Bros. and Island Bay, he generally worked as a laborer except for a brief period when he worked as a truckdriver. His job duties consisted of laying pipes in the ground, connecting the pipes with bolts and racks, mixing cement and cementing the pipes, installing truss blocks behind angled pipes and, once surface grading was finished, cementing the metal castings in place. Matos admitted that he had no experience building concrete curbs. Matos testified that, when work was slow, he also changed the oil and cleaned the company vehicles. Matos further testified that he generally received his assignments from Ernest Francis and that, once assigned to a job, he would remain on the job until it was finished. He recalled working on one job at a cemetery that lasted more than a year and another job, doing the water and sewer work at an apartment complex, that also lasted a long time. When he finished work at one job, he was generally sent to work at another job. Matos testified that he also worked on some jobs with Philip Francis and on private homes with Art Francis. The latter jobs were of short duration.

During the years prior to 1996 that he worked for the various companies operated by the Francis brothers, Matos was unaware that any of the employees were represented by a union. Matos testified that, on one occasion, in 1994 or 1995, he heard some talk about the Union and asked Ernest Francis about it. According to Matos, Ernest Francis told him that the Union was no good, that it "sucked." Matos testified that he asked no further questions about the Union after that. Francis did not dispute this testimony.

Matos testified that, in March 1996, Ernest Francis sent him to work at the Fortunoff job.[6] According to Matos, the Respondent was doing the sewer and drainage and water main work, as well as putting in light posts and castings, at the site of a new Fortunoff's store being built. Shortly after starting on that job site, a union business agent from Local 66 of the Laborers' Union approached him in the field and asked to see his union book. When Matos told him that he didn't have one, the business agent, whose name Matos did not know, told him that if he was not a union member, he did not belong on the job. Matos told the business agent to talk to Ernest Francis. Matos testified further that, after being on the job about 2 to 3 weeks, Ernest Francis called him into the trailer one morning and gave him $420, telling Matos to go down to the union hall and speak to Domiano, that he was going to give Matos a union book. Matos then went to the union hall, gave Domiano the $420 and told him that Ernest Francis sent him to get a book. Domiano took the money and gave Matos a receipt indicating that he had joined the Union. The receipt in evidence is dated March 25 and indicates that the $420 represented Matos' initiation fee and 6 months' dues, through September. Matos testified that, after joining the Union, he returned to the job and showed Ernest Francis the receipt. According to Matos, Francis looked at the receipt and said: "don't let it get to your heard. Don't get greedy."

When Matos started working on the Fortunoff job, his paychecks were from Island Bay Construction and he was paid at the rate of $18 per hour. Despite joining the Union on March 25, Matos continued to be paid at the same rate by Island Bay through September 10. Matos testified that Ernest Francis handed him his paycheck each week. The 1993–1996 collective-bargaining agreement in evidence, signed by Tom Francis on behalf of the Respondent, and effective through May 31, indicates that the hourly rate for union laborers ranged from $21.29 to $23.04, depending on job classification.[7]

[4] Francis testified that he first met Matos when Matos started to work for Francis Bros., in 1986 or 1987.

[5] The transcript of the first day of the hearing incorrectly refers to this job as the "Fortune Office" job. At the June 11 hearing, I granted the General Counsel's motion to correct the transcript to reflect the correct name of the project on which Matos worked in 1996 as the "Fortunoff's job."

[6] This job is also referred to in the record as the Source, apparently the name of the shopping center in which the new Fortunoff's store was being built.

[7] The collective-bargaining agreement that succeeded the 1993–1996 contract is not in evidence.

Matos testified that, in about July, another laborer employed by the Respondent on the Fortunoff job, identified in the record as Tom Martin, showed Matos his paycheck. According to Matos, Martin was being paid at the hourly rate of $23.62 to do the same work that he was doing. On learning this, Matos went to the union hall and complained to Domiano. Although Matos testified on cross-examination that Martin showed him his paycheck the first week Matos was paid after joining the Union, payroll records in evidence show that Martin was not employed on the Fortunoff job until August 22, a Thursday. Thus, the earliest that Matos would have learned that he was not receiving the union wage rate was in late August.

According to Matos, he also complained to the Union that he was not getting the right stamps for his union benefits. According to Matos, Domiano told him that he would send Jimmy, his union delegate, to speak to Ernest Francis about it. After visiting the union hall, Matos saw the delegate at the job site, talking to Ernest Francis. Matos did not know who he was, but Martin told him it was Jimmy.[8] Matos further testified that, in about September, Ernest Francis called him over to his truck and told Matos that he was going to take care of it, that he would give Matos his stamps. The stamps referred to are stamps issued by the Union, on receipt of fringe benefit payments from an employer, which document an employees' hours for purposes of benefits eligibility. The Union gives the stamps to the employer who in turn gives them to the employees. The employees are supposed to put the stamps in their union book and show it to the Union when seeking benefits. Matos testified that, after this conversation, Francis gave him stamps, but not the correct amount. In evidence is a paystub from Francis Building Corp., the Respondent, for the week ending September 17, showing that Matos was paid at the union rate of $23.62 per hour. Matos testified that this is the first check he received in the proper amount. Matos continued to be paid this hourly rate by the Respondent after that date until his termination. Matos further testified that, at some point he also began receiving the benefit stamps with his paycheck, but he could not recall the date.

Matos testified that, at some undisclosed time, he was called into the trailer by Ernest Francis and handed a paper which purports to calculate the backpay owed to Matos for the period March 25 through September 10 when the Respondent was not paying him at the union rate. According to Matos, Francis told him the paper showed all the deductions, but there was no discussion or conversation regarding the calculations on the paper and he received no money at that time. A week later, Francis told Matos that the calculations he had given Matos were wrong and that the office was re-doing them. Matos testified that, on October 11, Ernest Francis handed him his paycheck with another check for $2.65 and another sheet of paper with calculations. Francis told Matos that this was the backpay that the Respondent owed him and that the paper explained how the Respondent had calculated it. The calculations on both sheets of paper given to Matos are virtually indecipherable and do not show how the Respondent arrived at the sum of $2.65. It appears, as Matos testified, that the Respondent deducted from his backpay the $420 that Ernest Francis gave Matos in March to join the Union and monthly premiums for the Respondent's own health insurance benefits. According to Matos, deductions had not been made from his pay for health benefits during the time he worked for the nonunion Francis Bros. and Island Bay. It also appears that the Respondent may have deducted the cost of the union benefit stamps it purchased for Matos. During his testimony, Francis admitted that the Respondent deducted what it had paid for Matos' medical insurance, claiming that, if he did not, the Respondent would be in violation of the collective-bargaining agreement because Matos would be receiving more than the other union laborers on the job.[9] Francis admitted further that he could not explain most of the calculations on the two papers that he gave Matos which purported to show how he was made whole. Thus, it is impossible to tell from the evidence in the record how the Respondent arrived at the figure of $2.65 as the total backpay it owed Matos.

Matos testified that, after receiving the check for $2.65 and the calculations, he went to the union hall and showed them to Domiano. Domiano photocopied these documents and told Matos that he would send Jimmy to talk to Ernest Francis. The following Monday, Matos saw Jimmy come to the jobsite and speak to Ernest Francis. That Friday, October 18, when Matos did not receive any additional backpay with his paycheck, he went back to the Union and told Domiano that he still wasn't being paid right. Domiano told Matos that he didn't know much about his case and that Matos should wait for Jimmy to come in. When Jimmy arrived at the office, at approximately 3:45, Matos told him what was going on with his backpay and benefit stamps. Jimmy told Matos that Mr. Francis paid all his benefits already. When Matos asked about backpay, Jimmy said: "you will have to speak to Mr. Francis about that." Matos said he could speak to Mr. Francis, but he probably would not get anywhere and suggested that Jimmy was not doing his job properly. According to Matos, Jimmy became angry, walked to the phone, called Francis and said: "Ernie, I got your man here. He is complaining that you are not taking care of him." Jimmy then asked Matos if he wanted to speak to Ernie and said, into the phone, "Ernie, do you want to speak to him?" According to Matos, Jimmy used a speakerphone and he heard Ernie say yes. Matos told Jimmy that he didn't want to speak to Ernie, that Jimmy was the delegate and he should take care of the matter. After this, the conversation ended, Jimmy hung up the phone and Matos left the union hall.

Matos testified that, about 10 minutes after getting home from the union hall, he received a telephone call from Ernie Francis. Francis told Matos that he was sorry but he had to let him go. According to Matos, he responded, "okay, whatever" and said nothing further. Matos testified that Ernie Francis did not say why he was being let go and that nothing had been said earlier about a layoff, either during the workday or when he was given his paycheck. Matos testified that the Respondent's work on the Fortunoff job was not done at the time of his layoff. At the time of the layoff, according to Matos, there were one or two other laborers, whose names Matos could not recall, who had been working on this job for the Respondent the whole time. In addition, the Respondent occasionally sent Jim Sweeney or Bill Reed from the yard when it needed people to finish certain jobs. Ernest Francis admitted that Sweeney and Reed were employees of Island Bay and that they occasionally

[8] "Jimmy" is apparently James Winship, the Union's business agent, who was called as a witness by the Respondent.

[9] Even had the Respondent been making contributions to the Union's benefit funds on Matos' behalf, he would not have been eligible for union health benefits until he worked 1000 hours in covered employment.

worked at the Fortunoff job, either delivering material or taking as-builts. There is no dispute that Matos has not been recalled by the Respondent, nor offered employment by any other company operated by the Francis brothers, since October 18.

On cross-examination, Matos acknowledged that, about 2 weeks before he was laid off, the Respondent started building the forms for the concrete curbs and this was work he had never done before. Matos also testified that, at the time of his layoff, the Respondent still had to bring the water main to the other side of the building and do the drainage work on that side and the finish grading, work he had customarily done. Matos testified that, when he went to the Fortunoff's store, sometime between May and July 1997, he observed Ernest Francis' truck on the site and Lee Francis operating the machinery to do the leaching rings on the other side of the building. Matos further testified that he observed the Respondent working on a courthouse construction site in Islip, New York, doing gutters and observed Reed and Sweeney working at an apartment complex near the courthouse job.

As noted above, Francis testified that he first met Matos in 1986 or 1987 when Matos started to work for Francis Bros. According to Francis, Matos left Francis Bros. in January 1994, for reasons he did not know. When Matos returned in August 1994, he was employed by Island Bay. Francis testified further that Matos left Island Bay in October 1994 after he denied Matos' request for a raise. According to Francis, Matos did not return to work for one of the companies operated by the Francis brothers until he started at the Fortunoff job in March 1996, approximately 18 months later. Francis also contradicted Matos' testimony that he would only be laid off for a few months in the winter and would be recalled in the spring. According to Francis, the Respondent never recalled Matos. Matos usually solicited his employment by coming into the office and asking one of the Francis brothers if they had any work. Francis also claimed that the Respondent had never shut down because of the weather and that, with a rare exception, it generally works year round.

Francis testified that Francis Bros. had a contract with Turner Construction to perform work at the Fortunoff's site and in turn contracted with the Respondent to supply union labor to execute the work that Francis Bros. contracted to do for Turner. He characterized this as a "union job." According to Francis, approximately 90 percent of Francis Bros. contracts were for nonunion jobs and the remaining 10 percent were union jobs. All of the Respondent's jobs were union. He admitted that the only reason the Respondent was involved with the Fortunoff job was because it was a union job. Francis admitted that he was in charge of the Fortunoff job and was onsite every day from 6:30 a.m. until 6:30 p.m. According to Francis, the Respondent started work at the Fortunoff job about March 5. At that time, the only other job for which the Respondent supplied union labor to Francis Bros. was the Federal courthouse project in Central Islip, New York. Francis testified that these were the only union jobs that Francis Bros. has had from March 1996 to the present.

Francis testified that he and his brother Tom hired Matos, on or about March 5 or 6, to work for Island Bay at the Fortunoff job. According to Francis, Matos agreed to the terms of $18 per hour plus family medical insurance coverage. Within Matos' first week on the job, Francis was approached by a shop steward for Laborers' Local 66 and questioned about Matos.[10] Francis told the steward that Matos was not in the Union and that his duties were not covered by the union contract. Francis testified that, early in the job, Matos' duties were those of a "runner," i.e., bringing fuel for the trucks and machinery to the job site, fueling the machines, setting up the office trailer, etc. About a week later, the Local 66 steward brought his business agent to the job and Ernest Francis again explained why he believed that Matos' work was not within that Union's jurisdiction. Although Francis at first testified that the Local 66 business agent did not question nor talk to him again about Matos, he later said that Matos joined the Union on March 25 because the Local 66 shop steward was relentless in harassing Matos and himself about Matos not having a union book. Francis testified that he told Matos that he could go down to Local 1298's hall and get a book to "show the Local 66 shop steward and hopefully get him off our back." He also told Matos that he would not be a union employee because "if he was going to concern himself with being a union employee, there would be days he wouldn't work if it rained" or because of union jurisdictional limits. He admitted giving Matos the money to join the Union and admitted further that Matos continued to be paid the $18 per hour and receive the medical coverage he had been receiving as an employee of Island Bay. Francis further admitted that the wage and benefit package under the Local 1298 collective-bargaining agreement was higher.

In approximately mid-August, according to Francis, the Local 1298 business agent, Winship, came to the site and told him that Matos had gone to the union hall and complained that he was not getting the proper pay and union benefit stamps. Francis testified that he was surprised by this because Matos had not complained to him about it. Francis gave Winship the same explanation that he had given the Local 66 business agent, i.e., that Matos' duties, which included counting trucks to make sure that the correct amount of fill was being brought on site, were not within Local 1298's jurisdiction.[11] According to Francis, although Winship indicated he understood the Respondent's position, he said it could be interpreted as being covered by the contract. As a result of these conversations with Winship, Francis decided to pay Matos, retroactive to April 1, the difference in wages and all benefits he should have received under the collective-bargaining agreement.

According to Francis, the Employer is required, at the end of each week, to give the employees covered by the Local 1298 collective-bargaining agreement, along with their paychecks, stamps indicating the number of hours they worked that week. Employers buy these stamps from the Union by making the required fringe benefit contributions on behalf of the employees who've worked for the week. The Respondent usually purchases stamps in a lump sum and distributes them to the employees over time. Because the Respondent did not have enough stamps in the office to give Matos all of his retroactive stamps at one time, Francis decided to double up his stamps, i.e., give him 80 or 120 hours each week instead of 40 until he caught up. Francis testified that the Respondent ultimately pur-

[10] According to Francis, Local 66 was responsible for all laborers performing work inside and within 5 feet of the building while Local 1298 had jurisdiction over the exterior work done by laborers.

[11] Francis conceded that he did use Matos' to perform work clearly covered by the laborers' contract, including laying pipe and excavation work, but he estimated that the ratio was 60/40 or 70/30 between laborers' duties and running for fuel and parts.

chased from Local 1298 all the stamps that Matos was owed from April 1 to September. He denied ever receiving any grievance from the Union claiming that the Respondent had not properly paid Matos or made restitution.

According to Francis, he met with Matos after talking to Winship and told Matos that the Respondent was going to pay all the benefit stamps dating back to when he joined the Union and the pay differential. Matos asked Francis if, rather than buying the stamps, the Respondent could give him that money in a lump sum. According to Francis, Matos explained that he wanted it done this way, because he would probably not be around as a union employee long enough to take advantage of the benefits that would be paid for with the stamps. He suggested that the Respondent pay him $5000 to resolve the issue over the stamps. Francis testified that Matos had been talking about moving to Puerto Rico since he came to the job, because he had bought a house there and he was just waiting for his wife to sell her house here.[12] Francis told Matos that he had to purchase the stamps, because the Union was aware of the situation and had determined that Matos' work was covered by the collective-bargaining agreement. It was beyond any type of private agreement at that point. According to Francis, Matos became angry. Matos did not rebut this testimony.

Francis testified that he made the decision to lay off Matos because the Respondent was just starting the curb work and needed an experienced concrete laborer. Matos did not have this experience. About 3 weeks before the layoff, Francis had asked Winship to supply an experienced concrete laborer and Winship had told him that he had a concrete foremen, Steve Gervasi, who was coming off another job in a few weeks. Francis told Winship to send Gervasi to the Respondent when he became available. Once Francis decided to hire Gervasi to do the concrete curbs, he did not need to retain the other two laborers on the job, Matos and Tom Martin. He chose Matos to let go because Martin was able to read plans and surveyor's stakes and make mathematical calculations whereas Matos could not.[13] Francis also claimed that Matos was not capable of working independently and needed to be given specific directions regarding what to do. According to Francis, the week ending October 18, which was Matos last week, the Respondent was starting concrete operations. At the beginning of the week, he told Matos that he had requested a concrete foreman and was expecting one on site, but unfortunately, he would have to take Matos' place. Matos was upset and said that he had been there longer and was there already. Francis replied that, "on a union job with union personnel, this is what we do. This is the way of the Union. You use the best, the most experienced." That Friday, when he handed Matos' his check, he told him that would be it, that he had just received word that Gervasi would be starting on Monday.

Francis testified further that, at approximately 4 to 4:30 p.m. that afternoon, he received a call from Winship. Winship told Francis that Matos was just down at the union hall complaining that he didn't get his proper wages for the job. Winship did not mention any discrepancy in the benefit stamps. Francis told Winship that he explained to Matos a couple times how they calculated the back wages. Winship said that Matos was still under the impression that he got shafted and didn't receive all the wages he had coming to him. After this call, Francis called Matos at home and told him that, if he had any questions about his wages and how they were calculated, to go to the office and speak to Nicole, the secretary who did the calculations. Francis suggested that Matos bring his wife and have Nicole explain it to her if he didn't understand. Matos never pursued this suggestion.

There is no dispute that the Respondent had another Union job at the time, at the courthouse in Central Islip. Francis testified that he asked his brother Tom, who was in charge of that job, if he needed any help because he was letting Matos go. According to Ernest Francis, Tom told him that he did not need any more laborers, that in fact he was laying off a couple of key people himself. Tom Francis did not testify in this proceeding. The Respondent's payroll records in fact show that the Respondent added a third employee on the Courthouse job on October 14, the beginning of Matos last week as an employee of the Respondent. From October 14 through November 11, the Respondent regularly employed three laborers at the Courthouse job and, beginning on November 12, the Respondent had four laborers working there through the end of November. Rather than reducing the crew on the Courthouse job, as Francis claimed, these records show that the Respondent was increasing it around the time Matos was laid off.

Francis testified that, under the Respondent's collective-bargaining agreement with the Union, it could hire members in good standing directly without going through the Union's hiring hall. Francis testified that Francis Bros. also had nonunion construction jobs at the time, but he could not send Matos to work on those jobs because he was a union member. Francis testified that the Union's bylaws prohibit union members from working with nonmembers and that, if the Union found out, they would picket the job, and try to shut it down. He also claimed that it would not be cost-effective to put a union man on a job that had been awarded at a nonunion labor rate. Francis adamantly denied that any employee of the Respondent had ever gone to work for one of the nonunion companies operated by the Francis brothers. As far as Francis was concerned, once Matos became a union member he could never again work for Francis Bros. or Island Bay. Francis testified that only one employee on the Respondent's payroll, Frank Fiordilino, has worked steadily. According to Francis, the remainder of the Respondent's employees are obtained for limited periods to perform work required on a union contract and then let go when the work is done. Francis testified that the Fortunoff job was the first time Tom Martin, Matos' coworker and a member of the Union, had worked for the Respondent.

The General Counsel introduced the Respondent's payroll records for the period July 1, 1996, through August 22, 1997. Matos does not appear on these records until September 11, even though it is undisputed that he was working on the Fortunoff's jobsite, identified as the Source on the Respondent's payroll records, since March. The only employee on the Respondent's payroll working at this job before September 11 was Tom Martin, the coworker who showed Matos' his paycheck. As noted above, Martin's first day on the job was August 22. The only employee on the Respondent's payroll before August 22 is Fiordilino. The records show that Fiordilino was employed by the Respondent from July 18, 1995, until March 21, 1997. The records also show that Fiordilino worked steadily for

[12] Although Matos admitted on cross-examination that he bought a house in Puerto Rico in 1996, he did not move there until December 1997, more than a year after his termination by the Respondent.

[13] Matos admitted on cross-examination that he could not do these calculations and that he relied on Ernest Francis to tell him where and how to lay pipe, etc.

the Respondent and that he was shifted from job to job. In fact, Fiordilino worked on the Fortunoff's job on October 24 and 25, the week after Matos was laid off. The Respondent's payroll records also confirm that Gervasi started on October 21, the Monday following Matos' layoff, and that he and Martin were the only laborers at the Fortunoff's job from October 28 through January 27, 1997. In early 1997, Fiordilino also occasionally worked at the Fortunoff's job as a third laborer. Finally, in contrast to Francis' testimony, these payroll records show that the Respondent "supplied union labor" to jobs other than the Fortunoff's and courthouse jobs during the period since March 1996, i.e., the New York Times and William Floyd High School, from July through the end of 1996.

Winship, the Union's business agent, testified as a witness for the Respondent. Winship corroborated Francis' testimony that, some time in September or October, a more precise date he could not recall, Francis had requested that the Union furnish a laborer that could handle concrete work. According to Winship, he told Francis that a member named Steve Gervasi would be available because the company that he worked for was going out of business. Winship testified that Francis asked him to supply Gervasi to the Fortunoff job when he became available and that Gervasi did go to work for the Respondent on that job. Winship further testified that Gervasi is a well-qualified laborer skilled in concrete and brick work and related areas.

Winship also confirmed Matos' testimony that Matos had complained to the Union about not receiving benefit stamps. Winship testified on direct examination that he spoke to Ernie Francis about it and Francis resolved the matter to the Union's satisfaction. Winship did not recall Matos complaining about his wages or backpay. On cross-examination by the General Counsel, Winship recalled that Matos had first complained to the Union's secretary/treasurer, Domiano, and that, after Matos was laid off by the Respondent, he came to the union hall and spoke to Winship directly. He recalled that Matos said something about being owed money for the period from March until September, but he did not recall seeing the check for $2.65 that Matos had received from the Respondent. According to Winship, he referred Matos' complaint about the stamps to the Union's benefits office and, after that office told Winship how much the Respondent owed for Matos benefits, Winship collected this amount from the Respondent. Winship recalled that, as far as he knew, Matos was receiving the proper wage rate from the time he joined the Union. On further questioning by the General Counsel, Winship acknowledged complaining to Francis, when he saw Matos working on the Fortunoff's job, that Matos could not work there unless he was in the Union and that Matos was then signed up with the Union. Winship further recalled that Matos brought copies of his pay stubs when he came to the office after his layoff and that Matos did say he didn't get all his benefit stamps and all his pay. According to Winship, the Union resolved the dispute over Matos' benefit stamps. With respect to his wage rate, Winship recalled that the pay subs showed that Matos was receiving the proper rate. Winship appeared genuinely surprised when told that Matos had not received the proper wage rate from March until September. Finally, Winship claimed that Matos told him that he was not happy about something and that he was going to the NLRB.

The Acting General Counsel alleges that Matos' discharge violates Section 8(a)(1) of the Act under the *Interboro*[14] doctrine, approved by the Supreme Court in *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984). Under this doctrine, an individual employee's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activity" protected by Section 7 of the Act. An employer who retaliates against an employee engaging in such protected activity violates the Act under Section 8(a)(1). In approving this interpretation of the Act, the Supreme Court agreed with the Board that an employee need not file a formal written grievance, nor explicitly refer to the collective-bargaining agreement as the basis for his complaint, to be protected under the Act. Moreover, the employee does not even have to be correct in his assertion that the collective-bargaining agreement has been violated for his activity to be protected. As long as the employee's complaint or action is based on a reasonable and honest belief that his contractual rights are being violated and is reasonably directed toward enforcement of a collectively bargained right, he is entitled to the protection of the Act.

The evidence in the instant case clearly establishes that Matos was engaged in protected concerted activity under the *Interboro* doctrine. It is undisputed that Matos was not paid the wages and benefits set forth in the collective-bargaining agreement between the Respondent and the Union from the time he joined the Union on March 25 until September 11. It is also undisputed that Matos' complained to the Union, in or about mid- to late-August, that he was not receiving the wages and benefits that he was entitled to under the contract. In fact, Francis admitted that Winship told him about Matos' complaint in mid-August. It is also undisputed that, after the Respondent started paying Matos the union wage rate and the current benefit stamps, a dispute remained over the amount he was owed for the period from March 25 though September 10. Although the Respondent attempted to resolve this dispute by paying Matos $2.65 on October 11, Matos was not satisfied with this result and went back to the Union on October 18, his last day of employment, to complain.

Matos' belief that he was entitled to union wages and benefits was reasonable and honest. It is undisputed that Francis instructed Matos to join the Union after being confronted with complaints from the Local 66 steward about Matos working on the Fortunoff's job without a book. Francis and Winship also confirmed that Winship had complained about Matos performing laborers' work on that job without being covered by the Local 1298 contract. Moreover, Francis conceded that Matos did perform at least some work covered by the Respondent's contract with the Union. In light of this concession, I credit Matos' testimony that he was doing the same type of work at the Fortunoff's job that he had done on nonunion jobs for Francis Brothers and Island Bay, and the same type of work that union member Martin was doing at the Fortunoff's job. Finally, Francis decision to pay Matos' union wages and benefits as a result of Winship's complaint demonstrates that Matos' complaint was a reasonable and honest one.

With respect to Matos' subsequent complaint that the Respondent did not pay him all the wages and benefits he was due for the period March 25 through September 10, I find that this was also based on a reasonable and honest belief that his con-

[14] *Interboro Contractors, Inc.,* 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

tract rights were violated. As noted above, the two sets of calculations that Francis gave Matos to explain how the Respondent determined his backpay do not clearly show where the figure of $2.65 came from. Francis was unable to explain it at the hearing. Thus, it is understandable that Matos would not understand why $2.65 was all he was entitled to for admittedly being paid $5.62 per hour less than the union rate over a period exceeding 5 months. His attempt on October 18 to enlist the assistance of the Union in being made whole was not unreasonable. As noted above, under *Interboro,* it is immaterial whether he was in fact entitled to more than $2.65 in backpay. The sole inquiry is whether his belief that he was not being properly compensated under the collective-bargaining agreement was a reasonable and honest one.

My finding that Matos was engaged in protected concerted activity does not end this case, because it must still be determined whether that activity motivated his termination or whether he would have been laid off on October 18 even had he never complained to the Union. Under the Board's *Wright Line* test, applicable to all cases where employer motivation is an issue, the General Counsel must make a prima facie showing that protected activity was a motivating factor in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate, by a preponderance of the evidence, that it would have taken the same action in the absence of protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Supreme Court approved this burden shifting analysis in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). To establish a prima facie case of unlawful motivation, the General counsel must show that the employee's activity was protected, that the employer was aware of the activity and that the employer had animus. Because direct evidence of motivation is seldom available, the Board has held that motivation may be inferred from the totality of circumstances. *Abbey's Transportation Services,* 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

As noted above, there is no dispute that Matos complained to the Union and that Francis was aware of this. There is a dispute whether Matos had already been notified of his layoff when he went back to the union hall on October 18 to complain about his backpay. According to Matos, he was called at home and told of his layoff after he returned home from the union hall where Winship had called Francis in his presence and told Francis that Matos was "complaining that [Francis] was not taking care of him." In contrast, Francis claims that he had informed Matos at the beginning of that week that he would be laid off as soon as the Union was able to send the concrete man to the job and that he told Matos again when he gave him his paycheck on October 18 that it was his last day. Although Winship attempted to corroborate Francis by testifying that Matos did not come to the union hall to complain until after he was laid off by the Respondent, I find that Winship was a generally unreliable witness. Winship initially testified that Matos did not complain to the Union about his wages and benefits until after he was laid off, but was forced to concede on cross-examination that Matos had first complained to his boss, the Union's secretary-treasurer Domiano, before his layoff. Francis himself acknowledged being informed by Winship, in mid-August, of Matos' complaints to the Union. Finally, I note that Winship generally displayed a poor recollection of dates and events regarding Matos' complaints to the Union. While it may be understandable that a union field representative like Winship, who is responsible for enforcing a collective-bargaining agreement at many different jobsites, would not recall events occurring 2 years ago, his testimony is nonetheless unreliable.

Although Matos exaggerated his employment history with the Francis family, he appeared to be testifying truthfully in all other respects. For example, he candidly admitted the limits of his skills and experience and conceded that the Respondent had started doing work he was not qualified to do shortly before his lay off. In contrast, Francis was not truthful about the state of the Respondent's other jobs at the time of Matos' layoff. Moreover, he attempted to diminish Matos' experience working for the Francis brothers, despite having taken advantage of that experience on and off for about 10 years. Only when he was pushed on cross-examination, did Francis acknowledge that Matos was doing laborers work at the Fortunoff's job. Accordingly, I credit Matos' testimony and find that, at the time he went to the union hall on October 18 and spoke to Winship, Matos had not been informed that he was laid off.

In order to prove animus, the Acting General Counsel relies upon Matos' undisputed testimony that Francis told him, in about 1994, that the Union "sucked." She also relies upon Francis' more current statement to Matos, when he joined the Union, "not to get greedy" and his testimony at the hearing that he advised Matos that, if he joined the Union, there might be days that he would not work because of weather or jurisdictional disputes. Finally, she cites one of the affirmative defenses raised by the Respondent's counsel in the answer to the complaint as evidence that the Respondent was hostile to Matos' assertion of his contract rights. I do not construe the assertion of an affirmative defense in a responsive pleading as evidence of animus and I find that Francis' crude expression of opinion regarding the Union in 1994 is too remote to support an unfair labor practice finding in 1996. The only statements that are material are those Francis made contemporaneous with Matos' entry in the Union which evidence the Respondent's perception that its relationship with Matos had changed as a result. As counsel for the Acting General Counsel points out in her brief, Francis was candid in his testimony when he said: "Diego elected to pursue to be in the Union, so he fell underneath that scrutiny."

Although Matos may not have worked continuously for the Respondent and its affiliated companies, he did have a long history of employment with the Francis family and apparently was well regarded prior to 1996, as evidenced by the fact that Tom Francis offered him employment on several occasions after he had left Francis brothers' employment. There is no evidence in the record that Matos was considered an incompetent or unqualified laborer before he joined the Union. Francis did not dispute Matos' testimony regarding the type of work he did as a laborer on nonunion jobs. Although Francis initially contradicted Matos' testimony regarding the work he was doing on the Fortunoff's job, Francis ultimately conceded that he used Matos to perform laborers' work on that job. The nature of the work on the Fortunoff's job, with the exception of the curb-building, was not significantly different from the water main and drainage work Matos had done, on and off, for about 10 years for the nonunion companies. It is apparent from the Respondent's action in keeping Matos on the nonunion payroll even though he had joined the Union and was working alongside union-represented employees on the same job, that the Respondent never intended to give Matos the benefits of union

membership. Only when business agent Winship, acting on Matos' complaint, pointed out the possible contract violation did the Respondent pay him the union wages and benefits. When viewed against this background, Francis comments regarding Matos' membership in the Union are evidence of the Respondent's hostility toward Matos' assertion of his right to be paid in accordance with the union contract.

Based on the above, I find that the Acting General Counsel has made out a prima facie case that protected activity was a motivating factor in the Respondent's decision to lay off Matos on October 18. The Respondent argues, essentially, that Matos would have been laid off in any event because the Respondent no longer needed him on the Fortunoff's job once the Union sent Gervasi to work there and the Respondent had no other work for Matos as a union member. As noted above, Matos acknowledged that the Respondent had begun building concrete curbs a few weeks before his layoff. This is consistent with the mutually corroborative testimony of Winship and Francis that Francis had requested a concrete laborer from the union hall in September or October. The testimony of Winship and Francis that Gervasi had the qualifications and experience to work with concrete curbs was not disputed by the General Counsel. Matos admitted that he did not have these skills. The payroll records in evidence also show that Matos was replaced by Gervasi and that no other laborers worked consistently on the Fortunoff's job after Matos was laid off. Based on this evidence, I credit the testimony of Francis that he did not need Matos on the Fortunoff's job after October 18. The question remains, however, whether the Respondent would have laid off Matos rather than send him to another job had he not attempted to enforce his contractual right to receive union wages and benefits.

Francis did not dispute Matos' testimony that, when he worked for the nonunion companies owned by the Francis Brothers, he would be sent from job to job and given other duties, such as maintaining company vehicles. Although Matos employment with the Francis brothers was not as continuous as Matos claimed, it does appear that the only breaks in his employment were due to Matos leaving on his own. Francis, in describing Matos' employment history with the various companies owned by the Francis brothers, did not testify to any previous occasion when Matos was laid off for lack of work. In contrast, soon after Matos was successful in obtaining the wages and benefits he was entitled to as a union member, he was let go because there was no more work for him. As noted above, Matos' layoff occurred at a time when the Respondent was increasing the number of employees working on its other union job at the Courthouse. Francis' hearsay testimony that his brother Tom told him he was laying off key employees from that job is contradicted by the Respondent's own payroll records. I also note that Francis acknowledged that the Respondent had the right to hire union members directly without going through the hiring hall and therefore could even have recalled Matos when it needed additional laborers at either the Fortunoff's job or the Courthouse. As noted above, the Respondent did employ additional laborers on these jobs at various times after Matos was laid off.

Francis explanation for not transferring Matos to a nonunion job, i.e., that as a union member he could no longer work for one of the Respondent's nonunion companies, is belied by the fact that the Respondent carried Matos on the payroll of it's nonunion affiliate, Island Bay, for more than 5 months after he joined the Union. Obviously, when it was convenient for the Respondent to have a nonunion member work on a union job it had no qualms about doing so. Only when that employee asserted his right under the contract to receive union wages and benefits did the Respondent become religious about adhering to the collective-bargaining agreement. It is apparent from the above that, had Matos continued to work on the Fortunoff's job at $18 per hour, or even had he accepted the $2.65 proffered as full satisfaction of his backpay claim, the Respondent would have found work for him to do. I thus find that the Respondent has not met its burden of proving that Matos would have been laid off on October 18 and not thereafter recalled even in the absence of protected activity.

Having found that the Acting General Counsel established a prima facie case of unlawful motivation and that the Respondent has not met its burden under *Wright Line,* supra, I find that the Respondent terminated Matos on October 18, and since then, has failed and refused to reinstate him, because he sought to enforce the terms and conditions of the collective-bargaining agreement covering his employment by the Respondent. *NLRB v. City Disposal Systems,* supra; *Interboro Contractors,* supra. Accord: *E. G. Clemente Contracting Corp.,* 315 NLRB 606 (1994); *U.S. Dismantlement Corp.,* 298 NLRB 1068 (1990).

CONCLUSIONS OF LAW

1. Francis Building Corporation (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Francis Building Corporation, Francis Brothers Sewer and Drainage, Inc. and Island Bay Development Company constitute a single employer within the meaning of the Act.

3. Local 1298, Laborers' International Union of North America is a labor organization within the meaning of Section 2(5) of the Act.

4. By discharging Diego Matos on October 18, 1996, and thereafter failing and refusing to reinstate him, because he sought to enforce the collective-bargaining agreement between the Respondent and the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co., 90* NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Francis Building Corporation, Middle Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to reinstate, or otherwise retaliating against any employee for seeking to enforce the terms of a collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Diego Matos immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Middle Island, New York, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, refuse to reinstate, or otherwise retaliate against any of you because you seek to enforce the terms of a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Diego Matos full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Diego Matos whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to the unlawful discharge of Diego Matos, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

FRANCIS BUILDING CORPORATION

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."